

## Office of Personnel Management

## § 359.304

Code, on the Senior Executive Service (SES).

### § 359.202 Definitions.

*Agency, Senior Executive Service position, senior executive, career appointee, limited emergency appointee, limited term appointee, and noncareer appointee*, are defined in 5 U.S.C. 3132(a).

*Probation and probationary period* mean the 1-year probation required by 5 U.S.C. 3393(d) upon initial career appointment to the SES.

*Reemployed annuitant* means an individual who is receiving an annuity under the Civil Service Retirement System or the Federal Employees' Retirement System on the basis of his or her former Federal service. A reemployed annuitant serves at the pleasure of the appointing authority.

## Subpart C—Removal of Career Appointees for Failure To Be Recertified

SOURCE: 56 FR 172, Jan. 3, 1991, unless otherwise noted.

### § 359.301 Coverage.

(a) This subpart covers a career appointee who has failed to be recertified under § 317.504 of this chapter.

(b) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

### § 359.302 Notice requirements.

(a) The agency shall notify the career appointee in writing before the effective date of the action. If the appointee has completed the SES probationary period, or was not required to serve a probationary period, the notice shall be at least 30 calendar days before the effective date of the removal.

(b) The notice shall advise the appointee of:

(1) The basis for the action;

(2) The appointee's placement rights under subpart G of this part—the position to which the appointee will be assigned shall be identified either in the advance notice or in a supplementary notice issued no later than 10 calendar

days before the effective date of the action;

(3) The appointee's right to appeal to the Merit Systems Protection Board, including the time limit for appeal and the office to which an appeal should be sent;

(4) The effective date of the removal; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

### § 359.303 Restrictions.

(a) Removal from the SES under this subpart may not be made effective within 120 days after—

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate supervisor who—

(i) Is noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

[56 FR 172, Jan. 3, 1991, as amended at 58 FR 58261, Nov. 1, 1993]

### § 359.304 Appeals.

Removal under this subpart is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701. Under 5 U.S.C. 7701(c)(1)(A), the decision of the agency shall be sustained if it is supported by substantial evidence, which is defined in the Board's regulations at 5 CFR 1201.56(c). The burden is on the agency to show that there is substantial evidence to support its action. Once such substantial evidence is demonstrated, the burden shifts to the appellant to refute the agency's case that there was substantial evidence or to make a demonstration under 5 U.S.C. 7701(c)(2).